Supreme Court, U.S.
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No. 01-179

In The

Supreme Court of the United States

CITY OF PASCO, WASHINGTON,

Petitioner,

v.

JANETTE HOPPER and SHARON RUPP,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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19 pp.

QUESTIONS PRESENTED

Does a city's opening of City Hall as a "gallery" for local artists without adopting any public guidelines or regulations defining or limiting what kinds of artwork could or could not be displayed create a designated public forum for the purposes of First Amendment analysis?

Did the City's removal of artwork for content reasons – despite the failure of the City to adopt or apply meaningful content guidelines – violate the First Amendment?

PARTIES TO THE PROCEEDING

Petitioner in this Court is the City of Pasco, Washington.

Respondents in this Court are Janette Hopper and Sharon Rupp.

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OPINION BELOW

The district court's opinion, (per Van Sickle, D.J.) granting petitioner's summary judgment motion is unpublished. The decision of the court of appeals reversing summary judgment is reported as *Hopper v. City of Pasco*, 241 F.3d 1067 (9th Cir. 2001).

CONSTITUTIONAL AND STATUTORY PROVISION

United States Constitution, First Amendment.

STATEMENT OF THE CASE

Petitioner, the City of Pasco ("Pasco") is a Washington municipal corporation located in Franklin County, Washington. The Arts Council of Mid-Columbia Region ("Arts Council") is an organization based in Kennewick, Washington, that promotes and sponsors the work of artists in Benton and Franklin Counties. In 1994, Pasco remodeled an abandoned school building to create a new city hall. "Faced with an expanse of barren walls, Gary Crutchfield, the City Manager, and his administrative assistant, Kurt Luhrs, decided to invite local artists to display their works in the public hallways." *Hopper v. City of Pasco*, 241 F.3d 1067, 1070 (9th Cir. 2001).

In 1995, Pasco commissioned the Arts Council to sponsor a series of exhibitions of these artists at the Pasco City Hall Building. *Id.* Pasco delegated to the Arts Council responsibility for selecting the artists and the artwork that was to be displayed. Pasco never adopted any public

guidelines or regulations defining or limiting what kinds of artwork could or could not be displayed as part of the program. *Id.* Although Luhrs wrote to Barbara Gurth, Director of the Arts Council, informing her that no controversial art should be included, the Arts Council ran the program without any pre-screening by Pasco whatsoever. *Id.* at 1071. "There was no selection process to monitor quality, content, or controversy." *Hopper*, 241 F.3d at 1071. Pasco and the Arts Council referred to exhibition space as the "Pasco City Hall Gallery."

For the duration of the program, which included three separate exhibits that ran from October 1995 through March 1996, the Arts Council rejected no artwork. According to Gurth, "it was never a question of selecting anybody. It was just simply these people coming forward and saying we would like to hang this month and we took them." *Id.* The City also never reviewed works prior to placing them in the gallery. *Id.* at 1072.

In 1996, Mrs. Rupp and Ms. Hopper signed contracts for the third exhibit. Mrs. Rupp agreed to show three small bronze sculptures. One of these, which was the source of the controversy, is alternately titled "To the Democrats, Republicans and Bipartisans," "Damn, I'm Stuck," or "A Woman Drinking from a Brook." It depicts a nude, headless woman, either lying or standing against a flat surface with her backside facing the viewer. Ms. Hopper agreed to show a series of ten, small lithographs entitled "Adam and Eve." The prints depict a naked couple (Adam and Eve) in silhouette and outline form in a variety of post-World War II German landscapes. A representative of the Arts Council assured Ms. Hopper

that nudity was not a problem, given that previous exhibitions at the gallery contained nudity. *Id.* at 1072. None of the prints depict explicit sexual activity. *Id.*

Pasco received two complaints from City employees about "To the Democrats, Republicans and Bipartisans." Neither Luhrs nor Crutchfield personally objected to the works as being obscene or inappropriate. *See* Petitioner's Petition for a Writ of Certiorari, at 4. Nevertheless, after the complaints, Luhrs ordered the Arts Council to remove all of Mrs. Rupp's work from the exhibit, including the two pieces that had received no complaints. Hopper's prints were never displayed. After Hopper delivered her prints, Luhrs examined them and showed the prints to various employees. In view of the employees' assessments that three of the prints were "offensive" and "sexually suggestive," Luhrs and Crutchfield decided not to display *any* of Hopper's work. *Hopper*, 241 F.3d at 1073.

Ms. Hopper and Mrs. Rupp were the only artists ever prevented from showing their work at Pasco City Hall. Works previously displayed at City Hall had included nudity, however, and at least one sculpture, depicting a starving man, had generated a number of complaints. "When asked to explain the apparent inconsistency in displaying those works in the Gallery but barring Rupp and Hopper's works, Luhrs shrugged it off, saying that he did not review all of the previous works." *Id.*

The district court acknowledged that in practice Pasco had no real screening process in place but concluded nonetheless that the Pasco City Hall is a nonpublic forum and that there was no evidence that Pasco had intentionally created a forum for public expression.

The Ninth Circuit reversed on appeal, holding that Pasco had created a designated public forum by inviting local artists to display their works at city hall without any clearly articulated or enforced screening guidelines or procedures. Applying well-settled law to this unique set of facts, the Ninth Circuit then concluded that the ad hoc decision to exclude all of petitioners' artwork from this designated public forum was both standard-less and content-based in violation of the First Amendment.

ARGUMENT AND AUTHORITIES

This Court should deny petitioner's writ of certiorari because (1) the Ninth Circuit's decision is not in conflict with the decision of another United States court of appeals; (2) the Ninth Circuit did not decide an important issue of federal law; and (3) the Ninth Circuit decision does not conflict with other decisions of this Court.

A. No Conflict Exists Between the Decision Below and Decisions of the Seventh and First Circuits.

A writ of certiorari under Rule 10(a) may be granted where a United States court of appeals entered a decision in conflict with the decision of another court of appeals on the same important matter. SUP. CT. R. 10(a). Pasco's claim that the Ninth Circuit decision conflicts with decisions of the Seventh and First Circuits is wholly without merit. The difference in result here from the Seventh and First Circuit cases cited by Pasco stems from starkly different and distinguishable factual circumstances. There is no conflict as to legal principles.

Pasco claims the Ninth Circuit decision here is in conflict with the Seventh Circuit's decision in *Piarowski v. Illinois Community College. See Piarowski v. Illinois Cmty. Coll.*, 759 F.2d 625 (7th Cir. 1985). *Piarowski* is factually distinguishable on several grounds.

First, in *Piarowski*, the chairman of the art department chose the works rather than delegating decision-making to an outside non-public, expert body, as in the case at bar. *Id.* at 627. Pasco chose to delegate all authority to the Arts Council, and did so without establishing any meaningful criteria whatsoever. It was this very decision to delegate without meaningful criteria and the lack of any pre-screening by Pasco, that the Ninth Circuit found evidenced an intent by Pasco to create a designated public forum. *Hopper*, 241 F.3d at 1078. *Piarowski*, conversely, involved defendants who retained all control, thus evidencing the lack of intent to create a designated public forum.

Second, the decision makers in *Piarowski* found the works indecent and possibly offensive. *Id.* at 627. Here, the Pasco decision makers, Luhrs and Crutchfield concede that neither of them found the works offensive. Petitioner's Petition for a Writ of Certiorari, at 4.

Finally, in considering the issue of the public forum, the Seventh Circuit found important that the public generally was not allowed to exhibit art. *See Piarowski*, 759 F.2d at 629 (noting that exhibits from outside the faculty and students of the college, though not non-existent, were rare). In contrast, Pasco opened its gallery broadly for any person in the area to exhibit. Pasco's factual

situation is closely analogous to that in *Southeastern Promotions* where outside producers put on plays. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975). The Seventh Circuit expressly recognized the factual distinction between *Southeastern Promotions* and *Piarowski*. It was crucial to the Seventh Circuit in *Piarowski* that outsiders only occasionally used the gallery and that almost all exhibits were by faculty members and students of the college. *See Piarowski*, 759 F.2d at 629 (finding that "occasional use by outsiders . . . is not enough to make a college art gallery a public forum"). The Seventh Circuit based its decision in part on the principle that common use by outsiders creates a designated public forum, while occasional use does not. *Id.* This analysis reflects that the Ninth and Seventh Circuits are in accord and not in conflict. Pasco's petition does not demonstrate a conflict under Rule 10. SUP. CT. R. 10(a).

Pasco's second claim, that a conflict exists with the First Circuit's *Close v. Lederle* decision, is equally without merit. *See Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970). In *Close*, the First Circuit did not even engage in a public forum analysis. Accordingly, there is no doctrinal conflict. More important, *Close* is again factually distinct. The art exhibition at issue did not involve outside sources. *Id.* at 989. As in *Piarowski*, *Close* involved an exhibit by a faculty member of a university. *Id.* Moreover, the pieces involved were, although not unlawfully obscene, sexually implicit. *See id.* at 989.

The *Close* court specifically focused on the indecency of the artwork in reaching its decision. *See id.* at 990. The paintings depicted genitalia in "clinical detail" and bore

titles such as "I'm only 12 and already my mother's lover wants me." *Id.* at 990. These factual distinctions take the Ninth Circuit's decision, where there is no contention that the works are graphic, into an entirely different realm from the decision of the First Circuit.

In summary, the Ninth Circuit did not deviate from established legal precedent. It applied existing law to a unique factual scenario involving unusually ad hoc, lackadaisical decision making. Because the First and Seventh Circuit cases cited by Pasco are factually distinguishable and no conflict exists, Pasco fails to satisfy the requirements of Rule 10(a).

B. The Ninth Circuit Decision Implicates No Important Question of Federal Law.

Moreover, the Ninth Circuit's decision does not implicate an important question of federal law as required by this Court's rules. SUP. CT. R. 10(a). Pasco claims that the Ninth Circuit's decision will discourage cities from experimenting with public art displays and, therefore, this Court must respond. Pasco provides no evidence whatsoever to support its claim. Rather, Pasco simply assumes its conclusion.

Pasco also claims it is impossible to establish criteria because individuals see and feel art differently. Although art is not objective, it is possible to adopt objective standards for the type of art to be displayed on government property. The federal government, as well as numerous states and localities, have public art programs that have been in existence for decades without running into the problems that Pasco confronted in this case, either

because they have retained control over the selection process or because they have otherwise limited access to the forum through a set of preexisting, consistently applied, and constitutionally sustainable rules. The National Assembly of State Arts Agencies identifies twenty-four states that have adopted public arts programs. *See,* www.nasaa-arts.org/new/nasaa/aoa/pubart___direct. *See, also, National Endowment for the Arts v. Finley,* 524 U.S. 569, 573, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998) (criteria applied to art in the context of funding decisions). Municipalities successfully establish criteria that involve difficult constitutional issues all the time. *See, e.g., City of Erie v. Pap's A.M.,* 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (upholding ordinance banning public nudity); *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (finding city noise ordinance did not violate First Amendment); *Frisby v. Schultz,* 487 U.S. 474, 488 (1988) (upholding town anti-picketing statute).

Regardless, the ease of establishing guidelines is irrelevant. A lack of resources is no excuse for violating constitutional rights. *See Romer v. Evans,* 517 U.S. 620, 635, 116 S. Ct. 1620, 134 L. Ed 2d 855 (1996) (rejecting state's interest in conserving its resources as excuse for not protecting homosexuals' rights). In fact, the Ninth Circuit specifically disputed the idea that its ruling would discourage other cities from experimenting with arts programs. *Hopper,* 241 F.3d at 1082.

The Ninth Circuit decision does not require that Pasco treat art as if it were a science. The decision simply requires that Pasco abandon its careless, slapdash approach and instead create and consistently enforce

objective standards. Because constitutional rights are paramount over the ease of establishing guidelines, there is no important question of law for this Court to decide. Pasco's argument fails to satisfy Rule 10(a).

C. The Ninth Circuit's Public Forum Analysis Does Not Conflict With Other Decisions of This Court.

The Ninth Circuit correctly applied established public forum analysis to Pasco's factual situation. Under this analysis, courts divide public property into three use-based categories: (1) "traditional" public forums; (2) "limited" or "designated" public forums; and (3) non public forums. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). The Ninth Circuit determined that Pasco's City Hall Gallery was a designated public forum. Far from conflicting with other decisions, the legal analysis employed by the Ninth Circuit is entirely consistent with almost twenty years of decision-making by this Court.

Pasco claims this decision conflicts with decisions of this Court that a public building, operated in a proprietary manner, is not usually considered a public forum. *See United States v. Kokinda*, 497 U.S. 720, 736, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality). But there is no conflict. The Ninth Circuit did not hold that buildings such as the Pasco City Hall usually would be treated as a designated public forum. Whether or not a public building is treated as a designated public forum, consistent with *Kokinda*, is determined by the specific facts of the case. *Kokinda* is factually distinguishable because in that case there was no intent by the Postal Service to open its

sidewalks to *any* First Amendment activity. *Id.* at 730. Furthermore, the Postal Service's regulation did not discriminate on the basis of content or viewpoint. *Id.* at 736.

Similarly, the other case Pasco cites, *Krishna Society v. Lee*, is factually distinguishable on the same basis. In *Krishna Society*, this Court found that Port Authority never intended to open its airport to *any* First Amendment activity. *Krishna Soc'y v. Lee*, 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992). Furthermore, both *Kokinda* and *Krishna Society* involved disruptive solicitation rather than invitations to display art. Here, Pasco intended and expected artistic expression to be displayed in its gallery. Therefore, no conflict exists between the Ninth Circuit and these decisions of this Court.

Pasco then acknowledges that the Ninth Circuit, consistent with established law, appropriately held government intent is key in determining whether Pasco established a designated public forum. *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985) (finding that the government creates a public forum by "intentionally opening a nontraditional public forum for public discourse"). As Pasco itself notes, the creation of a designated public forum is determined by three primary factors: (1) what the government said; (2) what the government did; and (3) the compatibility of the space with the expression. *See Perry*, 460 U.S. at 47. These are the factors employed by the Ninth Circuit.

Pasco takes issue with the Ninth Circuit's treatment of these factors as applied to the facts of the case. Pasco's assertion that the Ninth Circuit's application of this rule

leads to the creation of a designated public forum by haphazard conduct is, however, wrong. Quite the opposite is true. The Ninth Circuit ruling confirms the importance of the second factor delineated in *Perry* – that is, what the government actually did – in determining intent. As the court of appeals noted, it is *undisputed* that the city was inconsistent with respect to pre-screening. *Hopper*, 241 F.3d at n. 10. The undisputed nature of the facts undermines Pasco suggestion this is a factual question, inappropriate for summary judgment.

Determining whether what Pasco actually did created a designated public forum requires examination of both direct and circumstantial evidence. *See Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (finding both direct and circumstantial evidence relevant to discriminatory intent). Rarely does a policy itself provide conclusive evidence of government intent. *See id.* The historical background of the action, the sequence of events leading up to the action, and departures from stated policy are all relevant. *Id.* The Ninth Circuit considered each of these factors. Pasco attempts to find conflict by relying on the idea that what Pasco said is enough to establish intent. This Court, however, requires courts to look at both what the government said and did. Where the government establishes both the existence of a policy restricting access to a forum (what it said) and its consistent application (what it did), the non-public nature of the forum is preserved. *Cornelius*, 473 U.S. at 803-4.

Pasco lastly suggests that the Ninth Circuit ignored the relevance of a child's accessibility to this forum. As the Ninth Circuit recognized, there was no evidence that

children saw the exhibited works or would have been affected if they had seen the art. *Hopper*, 241 F.3d at 1081. There is no evidence in the record here to support the claim that Pasco's interest in protecting children was implicated by exhibition of Petitioners' art. Regardless, the potential presence of children has never been allowed to justify an otherwise unconstitutional standard-less and content-based decision to censor artistic expression. In the cases cited by Pasco, the government sought to apply articulated standards in a content neutral manner to the expression at issue. *See Reno v. ACLU*, 521 U.S. 844, 865, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997); *Board of Educ. v. Pico*, 457 U.S. 853, 871, 102 S. Ct. 2799, 73 L. Ed. 2d 435 (1982) (plurality); *FCC v. Pacifica Found.*, 438 U.S. 726, 749-50, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978).

In summary, the Ninth Circuit's decision does not conflict with any decision of this Court. Pasco thereby fails to satisfy Rule 10 of this Court.

CONCLUSION

Pasco raises no issue justifying the grant of certiorari. Pasco is unable to satisfy any of the criteria used to grant certiorari. There is no conflict between other circuits or this Court, and no important question of law for this

Court to settle. Respondents respectfully request that the Court deny the writ of certiorari.

DATED this 30th day of August, 2001.

Respectfully submitted,

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